

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 04-970076

**Sales and Use Tax
For The Period: 1993-1995**

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ISSUES

I. Sales/Use Tax: Non-taxable Drink Sales

Authority: IC 6-2.5-5-20; 45 IAC 2.2-5-40 to 42; Information Bulletin #29; Information Bulletin #29-A

The taxpayer protests the assessment of sales/use tax.

II. Tax Administration: Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

The taxpayer operates service stations and "food and fuel marts" at various locations within Indiana. The taxpayer made sales of taxable and non-taxable drinks, but did not segregate or break out the sales for bookkeeping purposes. The taxpayer claims the stores used old cash registers, which caused the taxable and non-taxable sales to be "lumped" together. The auditor, according to the taxpayer, used the "lump" price for projection without taking into account that some of the sales were non-taxable. Specifically, the taxpayer argues sales of bottled "ice-tea" and lemonade are non-taxable, and thus the taxpayer did not have to collect sales tax.

I. Sales/Use Tax: Non-taxable Drink Sales

DISCUSSION

The taxpayer relies upon Information Bulletin #29 and #29-A for the proposition that sales of “ice tea” and lemonade are non-taxable. Information Bulletin #29 states in pertinent part:

Any soft drink which contains carbonated water is subject to tax. Other drinks which may not contain carbonated water, but are normally purchased for consumption out of soft drink bottles or cans will be subject to tax The term “soft drinks” does not include fruit and vegetable juices

Information Bulletin #29-A reiterates that “fruit juices” are not subject to tax, regardless of percentage of fruit juice, as long as the fruit drink does not contain carbonated water. Thus, per the Information Bulletins, the sale of natural lemonade (a fruit juice) is not taxable. Artificial lemonade is not a fruit juice.

Regarding the sale of ice-tea, Information Bulletin #29 states that the sale of *tea* is non-taxable. Ice-tea, however, is a tea product, and is more akin to a soft drink. The non-taxable status of tea does not extend to products derived from tea. As 45 IAC 2.2-5-42 notes, some drinks which do not contain carbonated water are still similar to sodas and are thus taxable. Ice-tea, sold in bottles or cans, is similar to soft drinks sold in that manner, and therefore ice-tea is taxable.

FINDING

The taxpayer’s protest regarding natural lemonade is sustained; regarding ice-tea, the taxpayer is denied.

II. Tax Administration: Penalty

DISCUSSION

The taxpayer was assessed use tax for multiple items for which no tax was paid. These items include promotional items, office supplies, and office equipment. The taxpayer also made retail sales of taxable items, yet failed to collect sales tax. These items include sales of candy, gum, and chocolate drinks. By the taxpayer’s own admission, it failed at times to segregate taxable and non-taxable sales (caused by “old cash registers”). Nonetheless, the taxpayer requests the abatement of the negligence penalty. Indiana Code 6-8.1-10-2.1 states, in part, that if “the deficiency determined by the Department was due to reasonable cause and not willful neglect, the Department shall waive the penalty.” Regulation 45 IAC 15-11-2 also states,

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.

The Department finds that the deficiency was not due to reasonable cause. The taxpayer failed to collect tax on items that are clearly taxable and failed to self-assess use tax on many items.

FINDING

The taxpayer's protest is denied.